

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 05-2342 WMKC

UNITED STATES OF AMERICA,
Appellee,

v.

DANIEL W. PORTER
Appellant.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

BRIEF FOR THE APPELLANT

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SUMMARY OF THE CASE

On August 13, 2004 a grand jury returned a one-count indictment charging Mr. Porter with possessing four handguns between May 28 and 30, 2004 after having previously been convicted of a felony offense. On January 4, 2005 Mr. Porter appeared before United States District Judge Ortrie Smith and entered a guilty plea to that charge.

On May 13, 2005 Mr. Porter appeared for sentencing before Judge Smith. After an evidentiary hearing, Judge Smith found that Mr. Porter's criminal history, as calculated in the presentence report, was inadequate. The court further concluded that the guideline sentencing range did not adequately address the need to protect the public and the need to deter future criminal conduct.

Mr. Porter was sentenced to 120 months imprisonment, the statutory maximum, and 3 years of supervised release. He timely filed a notice of appeal seeking review of the district court's judgment.

Mr. Porter requests ten minutes for oral argument.

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JURISDICTIONAL STATEMENT

Mr. Porter was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). Jurisdiction in the trial court was proper pursuant to 18 U.S.C. § 3231 as Mr. Porter was charged with an offense against the United States. After a plea of guilty on May 13, 2005, the court sentenced Mr. Porter to 120 months imprisonment and 3 years of supervised release. Mr. Porter timely filed a notice of appeal from the judgment entered against him on May 16, 2005 pursuant to Fed.R.App.P. 4(b). This court's jurisdiction is proper pursuant to 28 U.S.C. § 1291, which provides for jurisdiction over a final judgment of a U.S. District Court.

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**APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE APPELLANT

STATEMENT OF THE ISSUES

I. ISSUE ONE: The court erred in departing upward pursuant to U.S.S.G. §4A1.3 from criminal history category II to category IV.

USSG Section 4A1.3

United States v. Mashek, 406 F.3d 1012 (8th Cir. 2005)

United States v. Walker, 393 F.3d 819 (8th Cir. 2005)

II. The court erred in imposing a 120 month sentence which was unreasonable.

United States v. Dalton, 404 F.3d 1020 (8th Cir. 2005)

United States v. Hadash, 408 F.3d 1080 (8th Cir. 2005)

United States v. Rogers, 400 F.3d 640 (8th Cir. 2005)

STATEMENT OF THE CASE

1. On May 28 or 29, 2004, Mr. Porter took firearms which he owned and threw them into the Missouri River. (PSI¹ at 5)

2. On June 10, 2004, Mr. Porter was arrested and charged with parental kidnaping in Jackson County, Missouri as a result of his alleged failure to return his

¹ Appellant will refer to the Presentence Investigation Report as PSI throughout the brief.

children from an overnight visit on June 6, 2005. He has remained in custody on those charges since that date. (PSI at 4)

3. On August 13, 2004, a federal grand jury charged Mr. Porter with being a felon in possession of firearms, relating to his possession and disposal of firearms on May 28 or 29, 2004. (PSI at 3)

4. On August 25, 2004 a grand jury sitting in Jackson County, Missouri charged Mr. Porter with two counts of Kidnaping - Terrorizing and two counts of Parental Kidnaping. The Kidnaping charges are class B felonies and carry a range of punishment of 5 to 15 years on each count. The Parental Kidnaping charges are class D felonies and carry a range of punishment of up to five years in prison on each count. (PSI at 10 and Sent.² at 42)

5. On January 4, 2005, Mr. Porter pled guilty to the federal indictment. (PSI at 3)

6. On March 24, 2005, the Court issued an Order notifying the parties that it would consider an upward departure for several reasons including United States Sentencing Guideline Section 4A1.3, a denial of a reduction in offense for acceptance

² Appellant will refer to the Sentencing Transcript as Sent. throughout the brief.

of responsibility, and a sentence above the guidelines range as authorized by *United States v. Booker*. (DR³ at Doc. No. 19)

7. After hearing evidence at the sentencing hearing, the district court concluded that Mr. Porter was deserving of a reduction in his offense level for acceptance of responsibility. (Sent. at 50) Over objection, the court also found that Mr. Porter was deserving of a four-level enhancement because the offense involved more than eight guns. (Id.) The applicable offense level was, therefore, twenty one. (Sent. at 51)

8. The court next found, pursuant to U.S.S.G. § 4A1.3, that Mr. Porter's criminal history category substantially underpresented the seriousness of his criminal history and his likelihood to re-offend. In so finding, the court relied upon two convictions for which Mr. Porter received probation but which were not included in the criminal history computation because they were fifteen and twenty years old. (PSI at 7) The court further found, by a preponderance of the evidence, that Mr. Porter had committed the offense of violation of an adult abuse Order and Kidnaping. (Sent. at 51-52) The court found that Mr. Porter's criminal history and conduct was more consistent with Category IV than II. (Sent. at 52)

³ Appellant will refer to the designated record as DR throughout the brief.

9. Finally, the court conducted a separate analysis of 18 U.S.C. § 3553(a) and concluded that a 120 month sentence (the statutory maximum) was required to adequately deter further criminal conduct and to protect the public. (Sent. at 55-57)

10. The court imposed the sentence of 120 months, to be followed by three years supervised release. (Sent. at 55) Mr. Porter timely filed a notice of appeal on May 16, 2005 seeking appellate review of the court's judgment pursuant to Fed.R.App.P. 4(b).

STATEMENT OF THE FACTS

Mr. Porter pled guilty to being a felon in possession of a firearm. At sentencing, the court departed from Criminal History Category II to Criminal History Category IV pursuant to U.S.S.G. § 4A1.3 finding that the applicable guideline range was 57-71 months. The court then considered the factors set forth in 18 U.S.C. § 3553(a) and imposed a 120 month sentence.

SUMMARY OF THE ARGUMENT

The court erred by imposing the maximum sentence allowed for Mr. Porter's conviction of being a felon in possession of a firearm. The court initially erred by finding that the appropriate category was IV rather than II, which provided a

guideline sentencing range of 57-71 months. The 120 month sentence imposed was an increase of 49 months above the high end of that range and was unreasonable.

ARGUMENT

ISSUE ONE: The court erred in departing upward pursuant to U.S.S.G. § 4A1.3 from Criminal History Category II to Category IV.

A. Standard of Review

The court of appeals reviews the district court's interpretation and application of the guidelines de novo. *United States v. Mashek*, 406 F.3d 1012 (8th Cir. 2005).

The court must review the district court's interpretation and application of the guidelines independently of the reasonableness of a sentence. *Mashek* at 1015. In this case, the district court erroneously interpreted and applied U.S.S.G. § 4A1.3, resulting in an illegal and unreasonable sentence.

B. Argument

A court may depart from the applicable guideline sentencing range if the criminal history category does not adequately reflect past criminal conduct or the likelihood that the defendant will commit future crimes. U.S.S.G. § 4A1.3; *United States v. Davila*, 964 F.2d 778 (8th Cir. 1992). In departing upward from category II to category IV, the court improperly relied on two prior convictions which were too

old to have been assessed criminal history points (carrying a concealed weapon in 1984 and stealing in 1989) and two pending charges (violation of an adult abuse order and kidnaping).

The two ancient prior convictions should not have been considered as grounds for an upward departure. Section 4A1.2, note 8 suggests that a prior conviction falling outside the applicable time period may be considered by the court in determining if an upward departure is warranted if the sentence “is evidence of similar, or serious dissimilar, criminal conduct.” Neither of Mr. Porter’s prior convictions can be considered “serious.” In 1984 Mr. Porter suffered a municipal conviction for carrying a concealed weapon. In 1989 Mr. Porter received a term of probation for stealing two pigs.

Section 4A1.3 dictates that criminal conduct not resulting in a conviction should be considered only if it is “similar” conduct. Courts are to avoid reading statutes in a way which would render any words redundant. *United States v. Walker*, 393 F.3d 819 (8th Cir. 2005). In construing a statute, courts must look first to the plain and ordinary meaning of words. *United States v. Kirchoff*, 387 F.3d 748 (8th Cir. 2004). The guidelines are to be given the same effect and authority as a statute inasmuch as they have been adopted by Congress. *See Stinson v. United States*, 508 U.S. 36 (1993). The prior offenses are not similar to the instant offense. Although

the 1984 conviction obviously involved some weapon, there is no record to support an assumption that the weapon was a firearm. It is patently obvious that pig stealing is dissimilar from firearm possession.

Likewise, the pending charges should not have been considered as grounds for an upward departure. Section 4A1.3 states the court may consider “*prior similar adult criminal conduct not resulting in a conviction.*” (U.S.S.G. § 4A1.3(a)(2)(e) emphasis added). The pending kidnaping charges are not the result of prior conduct by Mr. Porter. Mr. Porter pled guilty to having possessed guns between May 28 and 30, 2004. The kidnaping charges are as a result of Mr. Porter’s failure to return his children to their mother on June 6, 2005. Furthermore, the kidnaping charges are in no way similar to the conduct resulting in the instant conviction.

The allegations supporting the charge of the violation of an adult abuse order did not occur before May 28, 2004. However, those charges, too, are in no way similar to the felon in possession offense.

ISSUE TWO: The court erred by imposing a sentence of 120 months, which was unreasonable.

A. Standard of Review

In determining whether a sentence is reasonable, the court reviews for an abuse of discretion. *United States v. Dalton*, 404 F.3d 1029 (8th Cir. 2005).

B. Argument

Assuming for purposes of argument that the court correctly departed upward pursuant to § 4A1.3, Mr. Porter's applicable guideline range was 57-71 months. The court imposed a sentence 49 months greater than that range. Especially in light of the fact that the range was based on an upward departure, the sentence imposed was unreasonable.

A sentence is unreasonable when measured against the factors of unreasonableness set forth in U.S.S.G. § 3553(a). *United States v. Rogers*, 400 F.3d 640 (8th Cir. 2005). "Although the sentencing court has discretion to impose a sentence once it has considered all the § 3553(a) factors, its ruling 'may be unreasonable if [it] fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case.'" *United States v. Hadash*, 408 F.3d 1080, 1084 (8th Cir. 2005) quoting *United States v. Haack*, 403 F.3d 997, 1004 (8th Cir. 2005).

The district court conducted an analysis of the factors set forth in § 3553(a) and concluded that the 120 month sentence was needed to address the concerns in § 3553(a)(2)(B) and (C) - that is, adequate deterrence and protection of the public.

(Sent. at 55) The court noted that the guideline range “probably” does provide just punishment for the offense and that the nature and circumstances of the instant offense were not remarkable. (Sent. at 54-55)

The court failed to give adequate consideration to the fact that Mr. Porter is charged in the State of Missouri with kidnaping and that he will, in all likelihood, receive a substantial sentence upon conviction of that offense. The need for the sentence in the instant case to protect the public or to deter criminal conduct is diminished as that need is being met by the state prosecution.

Mr. Porter had four criminal history points as calculated by the rules set forth in the guidelines. The 120 month sentence does not promote Congress’ desire to avoid unwarranted sentencing disparities. See U.S.C. § 3553(a)(6). It is unreasonable to expect that defendants with similar convictions, guilty of similar conduct in the offense of conviction, would receive the statutory maximum.

CONCLUSION

For these reasons, Mr. Porter requests this Court to reverse the district court's 120-month sentence of imprisonment and remand the case for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 49(a), (b) and (d), Fed. R. Crim. P., and Rule 5(b), Fed. R. Civ. P., it is hereby CERTIFIED that two copies of the foregoing were mailed to Paul Becker, Assistant U.S. Attorney, 400 E. 9th Street, 5th Floor, Kansas City, Missouri 64106, and one copy will be sent to Daniel Porter at Jackson County Jail, 1300 Cherry, Kansas City, MO, on this 1st day of July, 2005.

LAINE T. CARDARELLA

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the page limitations (no more than 1,300 lines of monospaced type) as set forth in Fed. R. App. P. 32(a)(7)(C) and contains 2,672 words. I further certify that WordPerfect 10 for Windows, Times New Roman Font Face in Font size 14 was used to prepare this brief, and that the enclosed diskette has been scanned and is virus-free in compliance with Eighth Circuit Rule 28A(c).

LAINE T. CARDARELLA
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ADDENDUM

Judgment and Commitment